STATE OF MICHIGAN

COURT OF APPEALS

NANCY GARRETT,

Plaintiff-Appellant,

v

SAM H. GOODMAN BUILDING COMPANY, INC., and DONALD BRYANT, d/b/a D & B CEMENT,

Defendants-Appellees.

UNPUBLISHED
March 17, 2005

No. 251793
Wayne Circuit Court
LC No. 02-226727-NI

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant Bryant pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claims against all defendants. We affirm, but for reasons other than those stated by the trial court.

Plaintiff was having work done on her home. While construction of the home was underway, trucks needed to drive across plaintiff's driveway to access other homes under construction. During this time period, plaintiff had a moveable concrete step on the side of her home. Defendant was hired for the construction of a concrete driveway, walkway and other structures within plaintiff's home. The moveable concrete step had been moved so that the gravel could be stripped from the area and concrete forms could be put in place. The side door of plaintiff's home could not be used from the time the grading was done until after the concrete was poured. Defendant Goodman's employee admitted that the concrete step had been removed and never returned to the side door. After the pouring of the concrete, plaintiff assumed that the step had been returned and so she exited her house from the side door and without the step, she fell and sustained numerous injuries.

On appeal, plaintiff argues that the trial court incorrectly determined that the open and obvious danger doctrine applies to claims of negligence that do not sound in premises or product liability and to claims of breach of contract. Plaintiff argues that there is a question of fact regarding defendants' duties. We disagree. Whether defendants owed a duty to plaintiff is a question of law. *Fultz v Union-Commerce Associates*, 470 Mich 460, 463; 683 NW2d 587 (2004). This Court reviews questions of law de novo. Similarly, "this Court applies a de novo standard when reviewing motions for summary disposition made under MCR 2.116(C)(10), which tests the factual support for a claim." *Dressel v Ameribank*, 468 Mich 557, 561; 664

NW2d 151 (2003). In evaluating a motion under MCR 2.116(C)(10), "a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

Our Supreme Court has held that "accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort, as well as a breach of contract." *Fultz, supra* at 465. With regard to plaintiff's negligence claims:

> [i]t is well-established that a prima facie case of negligence requires a plaintiff to prove four elements: duty, breach of that duty, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96 n 10; 485 NW2d 676 (1992). The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. 'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.' *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). [*Fultz, supra* at 463.]

Addressing the defendant's duty in *Fultz*, our Supreme Court stated, "[t]he threshold question for negligence claims brought against a contractor on the basis of a maintenance[1] contract between a premises owner and that contractor is whether the contractor breached a duty *separate and distinct from those duties assumed under the contract*." *Id*. at 461-462 (emphasis added). "[A] tort action will not lie when based solely on the nonperformance of a contractual duty." *Id*. at 466.

Therefore, before this Court can determine whether defendant Goodman or defendant Bryant owed plaintiff a duty that is separate and distinct from their contractual duties, it must first determine what contractual duties are owed to plaintiff. Specifically, this Court must determine whether defendant Goodman had a duty to replace the step beneath plaintiff's side door once the walkway was completed. The trial court, however, never directly addressed plaintiff's breach of contract claim against defendant Goodman, but rather, dismissed all of plaintiff's claims on the basis that the missing step was open and obvious.

"The main goal of contract interpretation generally is to enforce the parties' intent." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). "Ambiguities in a contract generally raise questions of fact for the jury; however, if a contract must be construed according to its terms alone, it is the court's duty to interpret the language." *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 418; 668 NW2d 199 (2003). In this case, plaintiff never offered

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[1] Although the Supreme Court's ruling in *Fultz* dealt with the negligent performance of a maintenance contract, there is nothing in the opinion to suggest that its reasoning would not apply with equal force to a construction contract, as in the present case.

a written contract into evidence or alleged any specific oral representations by defendant Goodman that the step would be replaced, so even viewing the evidence in a light most favorable to plaintiff, we have no basis on which we could infer that replacing the step was part of plaintiff's reasonable expectations or defendant Goodman's duties under the contract. In addition, this Court held in *McDowell v Detroit*, 264 Mich App 337; 690 NW2d 513 (2004) that where a claim sounds in tort, irrespective of the wording of the complaint, this Court may use the same analysis utilized in reviewing a summary disposition motion for a tort action. *Id.* at 355-356. Like the court in *McDowell*, *supra*, after careful review of the plaintiff's contract claims, we are convinced that they are merely a recapitulation of plaintiff's tort claims. Thus, because plaintiff has failed to demonstrate any evidence that would allow this Court to infer a contract regarding the return of the moveable step and because plaintiff's contract claim sounds in tort rather than in contract law, we affirm the trial court's grant of summary disposition.

Returning to plaintiff's negligence claims, although, as a general rule, those persons or parties foreseeably injured by the negligent performance of a contractual duty are owed a duty of care, *Joyce v Rubin*, 249 Mich App 231, 243; 642 NW2d 360 (2002), neither defendant Goodman nor defendant Bryant owed plaintiff a duty of care that was separate and distinct from their duties under the contract. Plaintiff only alleges that defendant Goodman and defendant Bryant had a duty to "provide a product and conditions which were useable and safe and [were] negligent in not having done so." This duty arose solely because of the contract between plaintiff and defendant Goodman. Because no independent duty exists, plaintiff cannot maintain her tort actions based on the contract. *Fultz*, *supra* at 467. It was, therefore, unnecessary for the trial court to apply the open and obvious danger doctrine to defeat defendant Goodman's and defendant Bryant's duties.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello